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**ADAMS AND REESE LLP**

**ORIGINAL!**

DEPT OF TRANSPORTATION  
JUN 21 1999

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June 21, 1999

Dockets Management System  
U.S. Department of Transportation  
Room PL 401  
400 Seventh Street SW  
Washington, DC 20590-0001

RE: RSPA-99-5013 (HM-229) *35*

Greetings:

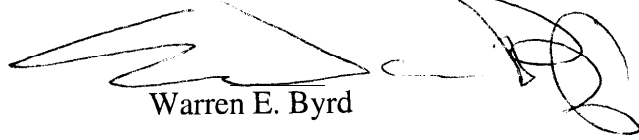
Adams and Reese LLP, on behalf of its client Union Pacific Railroad Company ("Union Pacific") submits two copies of comments to the proposed revisions to the Incident Reporting Requirements found in 49 CFR Parts 17 1.15 and 17 1.16. This submission is in response to the request for comments by the U.S. Department of Transportation, Research and Special Programs Administration, found in the Federal Register at Volume 64, Number 55, dated March 23, 1999, concerning 49 CFR Part 171.

The enclosed comments and proposed revisions were prepared by Adams and Reese and Union Pacific Railroad in conjunction with the Louisiana State Police as a joint effort to clarify what entities are to be notified in the event of a hazardous materials incident, as well as to place these requirements under the umbrella of a consistent and uniform federal law throughout the United States, but still grants appropriate authority (through federal law) to the designated agency in each state with regard to hazardous materials incidents which occur during transpiration by rail. Both parties feel strongly that the suggested revisions would be of great benefit to the transportation industry by insuring a uniform system of laws to govern hazardous materials incident reporting by rail, as well as recognizing legitimate state interests relative to receiving timely notice of these incidents.

Lastly, in general Adams and Reese and the Union Pacific Railroad Company hereby adopt by reference the comments and attachments transmitted to the U. S. Department of Transportation by letter dated June 14, 1999 (which included draft versions of 17 1.15 and 17 1.16) by reference, as if set forth herein inextenso. Additionally, we reserve the right to supplement the administrative record with additional comments and/or proposed regulatory changes to 49 CFR 17 1.15 and 17 1.16. For further information or if you have any questions or need any clarification, please contact the undersigned at (225) 336-5200.

With kind regards, I am,

Sincerely,



Warren E. Byrd

WEB/dlm

Attachment A: Comments by Adams and Reese LLP and Union Pacific Railroad  
Company

Attachment B: Comments made by the Louisiana Department of Public Safety and  
Corrections (9 pages)

**COMMENTS BY ADAMS AND REESE LLP**  
**AND UNION PACIFIC RAILROAD COMPANY**  
**TO U.S. DEPARTMENT OF TRANSPORTATION**

Submitted by: Warren E. Byrd  
c/o Adams and Reese LLP  
Bank One Centre, 19th Floor, North Tower  
451 Florida Street  
Baton Rouge, LA 70801  
Phone: (225) 336-5200  
Fax: (225) 336-5220

Date: June 21, 1999

**GENERAL BACKGROUND**

Several years ago the Louisiana Department of Public Safety and Corrections, Office of State Police, filed two assessments for civil penalties against the Union Pacific Railroad Company for alleged violations of State Hazardous Materials Reporting events under LSA R.S. 32:1510. The Union Pacific Railroad Company objected to the jurisdiction of the Louisiana State Police with regard to the reporting of "hazardous materials incidents" which were preempted by federal law, specifically the FRSA and other federal laws. When the Louisiana State Police and Union Pacific were not able to effectuate an amicable resolution of these two civil penalty assessments, in the form of a dismissal, Union Pacific filed suit in the United States District Court, Middle District of Louisiana, against the Louisiana State Police alleging both federal preemption and violation of the commerce clause and the supremacy clause of the U.S. Constitution. Cross motions for summary judgment were filed by both parties and the court ultimately granted summary judgment in favor of Union Pacific.

Following the issuance of the judgment by the federal court the parties jointly requested that the litigation be "administratively closed" in order to provide appropriate time to the parties to effectuate the necessary changes in the arena of hazardous materials reporting incidents in rail transportation.

Notwithstanding the above, Union Pacific Railroad Company and the Louisiana State Police have continued to work toward an amicable resolution of this matter. In that regard, when the U.S. Department of Transportation requested public comments in the Federal Register of March 23, 1999, both the Louisiana State Police and Union Pacific agreed to provide comments and petition the U.S. Department of Transportation for appropriate relief.

## **ANALYSIS**

There is an urgent need for the U.S. Department of Transportation to utilize its preemptive authority under the Federal Railroad Safety Act (FRSA) to create a uniform body of law which clearly and unequivocally places the reporting of hazardous materials incidents under federal law, and at the same time ensures that the appropriate state (in this case the State of Louisiana) receives notice at the same time notice is being provided to the National Response Center.

The Louisiana State Police has a legitimate concern in receiving a prompt notice of hazardous materials incidents which meet the reporting threshold and which occur within its boundaries and thereby possibly endanger the public health, safety and welfare of Louisiana citizens. The same can be said for every other State.

The Union Pacific Railroad Company believes that an appropriate mechanism should be devised under federal law to require that a carrier provide prompt notice to both the NRC and to the appropriate designated agency of each state in a single call.

It seems logical that one of the first "agencies" to respond to reportable hazardous material incident would be the HAZMAT unit of that particular state. (In this case the HAZMAT unit operated under the jurisdiction of the Louisiana State Police).

Since the existing Louisiana reporting requirements are different from the federal requirements, it is necessary for the U.S. Department of Transportation to enact appropriate "federal" laws which not only preempt this field but in so preempting specifically provide for protection of the states with regard to their legitimate rights to receive "notice" of reportable hazardous materials incidents at the same time such notice is provided to the federal government.

The changes necessary would be to 49 CFR Part 17 1.15 and 17 1.16. This would cover not only in the immediate verbal notification but the follow-up written reports. By creating a uniform "federal" law the mandates of the FRSA would be met and there would be no further confusion among the states with regard to any attempts to enact or enforce individual state requirements. Additionally, the states need provisions within the "federal" system which would enable the states to have appropriate laws to seek enforcement. This is a matter which can best be addressed by the Louisiana State Police itself, but is an area which Union Pacific Railroad Company recognizes is of concern and importance to each individual state and should be addressed by the U.S. Department of Transportation for federal uniformity and consistency relative to the actions which can be taken by the respective states regarding enforcement.

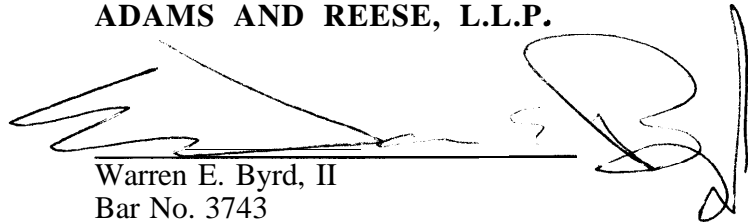
As previously stated, Adams and Reese and Union Pacific Railroad Company adopt by reference the comments (with attachments) made by the Louisiana Department of Public Safety and Corrections, Office of State Police, by its transmittal dated June 14, 1999, as if set forth herein inextenso. Those comments (and attachments) include suggested revisions to 49 CFR 17 1.15 and 17 1.16 which are specifically incorporated herein, by reference, as if set forth herein inextenso.

## **CONCLUSION**

It is imperative that the U.S. Department of Transportation ensure that the mandates of the FRSA are followed and that a uniform and consistent body of federal law with regard to hazardous material reportable incidents exist. The respective states have legitimate concerns regarding their need to receive prompt verbal notice of reportable hazardous material incidents which occur within their respective state boundaries. Additionally, the respective states also have legitimate concerns regarding enforcement under a uniform and consistent federal system of laws. By addressing these legitimate concerns, the U.S. Department of Transportation would also be establishing a functioning and protective body of federal law which would recognize the unique position of the railroad, as well as those legitimate interests of the state which can be met through appropriate changes through a creation of a uniform and consistent body of federal law which preempts the area of hazardous materials reporting incidents by rail.

Respectfully Submitted,

**ADAMS AND REESE, L.L.P.**

A handwritten signature in black ink, appearing to read 'Warren E. Byrd, II', is written over a horizontal line. The signature is stylized with a large, looping 'B' and a trailing flourish.

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*Department of Public Safety and Corrections*  
*Public Safety Services*

M. J. "MIKE" FOSTER, JR.  
GOVERNOR

June 14, 1999  
TS-1 1-003

W. R. "RUT" WHITTINGTON, COLONEL  
SUPERINTENDENT

Dockets Management System  
U.S. Department of Transportation  
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Washington, D.C. 20590-0001

**RE: RSPA-99-5013 (HM-229)**

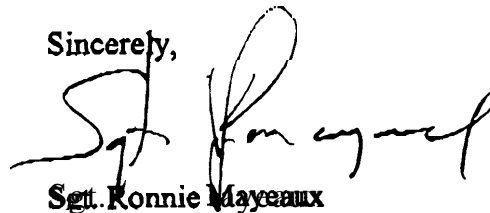
To Whom It May Concern:

The State of Louisiana **through** the Louisiana State Police hereby submits two copies of its comments and proposed revisions to the Incident Reporting Requirements found in 49 **CFR** Parts 17 1.15 and 17 1.16. This submission is in response to the request for comments by the Department of Transportation, Research and Special Programs Administration, found in the Federal Register, Vol. 64, No. **55**, dated March **23, 1999**, concerning 49 CFR Part 171.

The enclosed comments and proposed revisions were prepared by the Louisiana State Police in conjunction with the Union Pacific Railroad Company as a joint effort to clarify what entities are to be notified in the event of a hazardous materials incident, as well as to make these requirements uniform throughout the United States. Both parties strongly feel that the suggested revisions would be of great benefit to the **transportation** industry as well as to the hazardous materials response agencies **in** the various states.

For **further** information regarding the submission, please contact the undersigned at (225)925-6113 ext.209

Sincerely,



Sgt. Ronnie Mayeaux

RM/mcm

mailed  
6/15/99

Received Time Jun. 21. 10:56AM  
OFFICE OF STATE POLICE, P.O. BOX 66614, BATON ROUGE, LOUISIANA 70896-6614

Dockets Management System  
U.S. Department of Transportation  
Room PL 401  
400 Seventh St., SW  
Washington, D.C. 20590-0001

June 14, 1999

**RSPA-99-5013 (HM-229)**

Submitted by:  
Louisiana State Police  
**Attn: Sgt** Ronnie Mayeaux  
Mail Slip 21  
Baton Rouge, La. 70896

Petition **for** Rule Change

**Background:**

**Louisiana's** rights and responsibilities regarding the initial immediate notification and response to hazardous materials transportation emergencies is at the core of the Louisiana State Police's hazardous materials program. The transportation **industry** has **continuously** initiated litigation concerning these rights and responsibilities regarding this initial immediate **notification**. The challenge centers around the need for immediate State notification weighed against the perceived interference with interstate commerce caused by the various States' regulations. The **HMTA** and **FRSA** fail to specifically address the **issues** of individual State notification and compliance accountability. However, a recent DOT interpretation of these regulations supports the individual States' rights to require immediate notification and, thereby, accountability of the industry to provide accurate and timely immediate notifications. However, this position fails to provide a complete solution. Addressing the **concerns** of both State government and industry would be more appropriate. Specific regulatory changes to 49 CFR Parts 17.1.15 and 17.1.16 to include State immediate notifications with allowances for State specific accountability would provide the necessary complete solution.

The **Superfund Amendments** and Reauthorization Act (SARA, Title III) mandated States to initiate emergency planning efforts and identify emergency notification **points** at the State and local level. Uniform criteria **applied** at the State level would allow for ease of reporting by **the** transportation industry which would decrease delays and increase the accuracy of information. This standard would correspond with the intent of the **both** the EPA and DOT to support the response efforts of the States and to provide a sense of national uniformity. This uniform national criteria would be applied at the level legislated by each individual State, thus, providing for governmental oversight at the State level,

Louisiana's hazardous **materials** program received notification of 3538 reportable events in 1998. Approximately 50% **(1764)of these** incidents involved the transportation, **loading**, unloading or related storage of hazardous materials. The reporting requirements listed in 49 CFR 17 1 **.15** are very similar to those applied in Louisiana. An incident meeting these criteria would require that an immediate State notification be made any time the safety of the public is in question.

### Summary:

The Code of Federal Regulations, Title 49, Part 17 1.15 currently addresses the "Immediate Notice of Certain Hazardous Materials Incidents" to the United States Department of **Transportation**. Revising 49 CFR 17 1.15 and 17 1.16 to create the requirement of an **" Immediate State Notification"** , as well **as** expanding the criteria which trigger **this** requirement, has become necessary to clarify the **transportation** industry's responsibilities. The attached document modifies Parts 17 1.15 and 17 1.16 to address the issue of immediate State notification, The proposed **language** provides for the addition of the following:

- \* Establishes and **defines** immediate notification requirement
- \* Identifies and **defines** the criteria for the threatened releases and potential public **safety** threats
- \* Assigns and identifies the State entity **to receive the immediate** notification
- Specifies the minimum content of the immediate **notification**
- \* Establishes accountability to the assigned State agency

Federal requirements of State notification must be accompanied by the right of each **State** to legislate standards for accountability. **In** Louisiana, administrative civil penalties are assessed for violations of the immediate notification statutes, This accountability is necessary to ensure that those incidents which threaten public **safety are** handled in accordance with these specified standards.

The attached documents identify the specific language necessary to accomplish this effort. The appropriate section in Part 171 has been referenced with deletions stricken and additions underlined. This verbiage has incorporated the input of the Union Pacific Railroad in a joint effort with the State **of** Louisiana.

### Attachments



**§171.15 Immediate ~~notice~~ State Notification of certain hazardous materials incidents.**

(a) ~~At the earliest practicable moment, Each~~ carrier who transports hazardous materials (including hazardous wastes) shall give immediate notice in accordance with paragraphs (b) and (d) of this section ~~after each on any~~ incident that occurs during the course of transportation (including loading, unloading and ~~temporary~~ related storage) in ~~which -~~

(1) As a direct result of the hazardous materials\_ ' transportation -

- (i) A person is killed; or
- (ii) A **person** receives injuries requiring his **or** her hospitalization ; or
- (iii) Estimated carrier or other property damage exceeds **\$50,000**; or
- (iv) **An** evacuation of the general public occurs lasting one **or more** hours; **or**
- (v) One or more major transportation arteries **or** facilities are closed **or** shut **down** for one how or more; or
- (vi) The operational flight pattern or routine of an aircraft is altered; or

(2) Fire, breakage, spillage, or suspected radioactive contamination occurs involving shipment of radioactive material (see also §§ 174.45, 176.48, and 177.807 of this subchapter); or

(3) Fire, breakage, spillage, or suspected contamination occurs involving shipment of infectious substance (etiologic agents); **or**

(4) There has been a release of a marine pollutant in a quantity exceeding **450 L** (119 gallons) for liquids, or 400 kg (882 pounds) for solids; or

(5) A situation exists of such a nature ~~(e.g., a continuing danger to life exists at the scene of the incident)~~ that, in the judgment of the carrier, it should be reported to

~~the Department even though it does not meet the criteria of paragraph (a) (1), (2)~~  
~~or (3) of this section which:~~

(i) ~~Poses a continuing danger to life, health or property; or~~

(ii) ~~Results in a release of hazardous materials regulated by this~~

~~Subchapter; or~~

(iii) ~~Results in a threatened release due to damage or positioning of the~~  
~~hazardous materials package.~~

(d) ~~Each immediate state notification required by paragraph (a) shall be made~~  
~~immediately to the state emergency response commission designated under section~~  
~~304(b)(1) of the Superfund Amendments and Reauthorization Act, Title III, or to the state~~  
~~agency specifically designated to receive these notifications. These notifications shall~~  
~~include but not be limited to the following:~~

~~(i) name of caller and call back telephone number~~

~~(ii) name and address of rail carrier~~

~~(iii) location of incident~~

~~(iv) date and time of occurrence~~

~~(v) type of package and chemical involved~~

~~(vi) estimated quantity of release or identifications of circumstances of~~  
~~threatened release~~

~~(vii) identification of injuries, fatalities, fire or explosion~~

~~(viii) recommendation of protective action, i.e., road closure, sheltering or~~

evacuation

(ix) other related details

(e) Each rail carrier shall be responsible to the state with jurisdiction for the timeliness and accuracy of content of each immediate state notification. This accountability must be supported by the appropriate state legislation.

#### **49CFR 171.16 Detailed hazardous materials incident reports.**

- (a) Each **carrier** who transports hazardous materials shall report in writing, in **duplicate, on** DOT Form F 5800.1 (Rev. **6/89**) to the Department within 30 days of the **date of discovery, each** incident that occurs during the course of transportation (including loading, unloading, and temporary storage) in which **any** of the circumstances set forth in § 171.15(a) occurs or there has been an **unintentional** release of hazardous materials **from** a package (including a tank) or any quantity of hazardous waste has been discharged during transportation. If a report **pertains** to a hazardous waste discharge:
- (1) A copy of the hazardous waste manifest for **the** waste must be attached to the report; and
  - (2) **An** estimate of the quantity of the waste removed **from** the scene, the name and address of the facility to which it was **taken**, and the manner of disposition of **any** removed waste must **be** entered in Section IX of the report form (Form F 5800.1) (Rev. **6/89**).
- (b) **Each** carrier making a report under this section shall send the report to the Information Systems Manager, DHM-63, Research and Special Programs Administration, Department of Transportation, Washington, DC **20590-0001**; **one copy shall be sent to the State agency** designated to receive immediate notification and, for incidents involving transportation by aircraft, a copy of the report shall also be sent to the FAA Civil Aviation Security **Office** nearest the location of the incident. A copy of the report shall be retained for a period of two years, at the carrier's principal place of business, or at other places as authorized and approved in writing by an agency of the Department of Transportation.
- (c) Except as provided in paragraph (d) of this section, the requirements of paragraph (a) of this section do not apply to incidents involving the unintentional release of a hazardous material-
- (1) **Transported** under one of the following proper shipping names:
    - (i) Consumer commodity.
    - (ii) Battery, **electric storage**, wet, filled with acid **or** alkali.
    - (iii) Paint and **paint** related material when shipped in a packaging of five gallons or less.
  - (2) Prepared and transported as a limited quantity shipment in accordance with this subchapter.

(d) The exceptions to incident reporting provided in paragraph (c) of this section do not apply to:

- (1) Incidents required to be reported under § 17.1.15 (a);
- (2) Incidents involving transportation aboard **aircraft**;
- (3) Except for consumer commodities, materials in Packing Group I; or
- (4) **Incidents** involving the transportation of hazardous waste.

**NOTE:** A guideline document for **assisting** in the completion of DOT **Form** F 5800.1 (Rev. 6.89) may **be obtained from** the Office of Hazardous Materials Transportation, **DHM-51**, U.S. Department of Transportation, **Washington, DC** 205904001.

[Amdt. **171-7, 35** FR **16837**, Oct 3, 1970, as amended by **Amdt. 171-56, 45** FR 73683, Nov. 6 1980; **Amdt. No.** 171-65.47 FR 24584, June **7, 1982**; Amdt. **171-72, 48** FR **17095**, apr. 21, 1983; **Amdt. 171-101, 54** FR 25813, June 19, 1989; Amdt **171-109, 55** FR39978, Oct. **1, 1990**; Amdt **171-140, 61** FR 18932, Apr. 29 1996; **Amdt. 171-145, 61** FR 27172, May **30, 1996**]

## Definitions

(1) "Immediate" or "immediately" means a reasonable period of time after identifying the nature, quantity and potential off-site impact of a release considering the exigency of the circumstances, not to exceed one hour.

(2) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment any hazardous material regulated under this subchapter. However, the term "release" as used in this paragraph shall not include federal or state permitted releases.

(3) "Threatened Release" an incident, involving a hazardous material or its package, regulated by this subchapter, which due to damage or existing circumstances causes the hazardous material or its package to be positioned in a manner which effects the normal function of its valving or safety appliances. This would include damage to a package which prevents it from continuing in transportation or which requires the transfer of its contents.